

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE SAGASTUME
Claimant

VS.

RAINFOREST CAFÉ, INC.
Respondent

AND

ACE USA
Insurance Carrier

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Docket No. 1,014,040

ORDER

Claimant appealed the November 14, 2005, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on February 14, 2006.

APPEARANCES

C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Gary R. Terrill of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. In addition, as determined below, exhibits A and B to Dr. Fernando M. Egea's deposition have been excluded from the evidentiary record but Dr. Vito J. Carabetta's March 5, 2004, report has been included in the evidentiary record.

ISSUES

Claimant alleges he injured his back and right leg as a result of a June 27, 2003, accident. In the November 14, 2005, Award, Judge Hursh found claimant sustained a 10 percent functional impairment to his right leg. The Judge also determined claimant did not sustain any permanent impairment to his back due to the June 27, 2003, accident. Consequently, the Judge granted claimant permanent disability benefits under K.S.A. 44-510d for a 10 percent functional impairment to the right leg.

Claimant contends Judge Hursh erred. In his application for review, claimant raises the issues of (1) nature and extent of injury and impairment; (2) claimant's entitlement to unauthorized and future medical benefits; and (3) whether respondent's exhibits A, B, C, and D to Dr. Fernando M. Egea's deposition transcript should be included in the record.

Respondent and its insurance carrier also contend Judge Hursh erred. They do not contest that claimant injured his right leg in the June 27, 2003, accident, but they contend claimant sustained a six percent, rather than 10 percent, permanent functional impairment to his right leg. They agree with the Judge that claimant sustained no additional permanent impairment to his low back due to the June 27, 2003, accident as he allegedly had a 10 percent whole person impairment due to earlier low back surgery. Respondent and its insurance carrier also contend the Judge was correct in denying claimant's request for payment of Dr. Egea's charges in the sum of \$375 as unauthorized medical expense. Respondent and its insurance carrier request the Board to include their exhibits to Dr. Egea's deposition transcript as part of the record and to admit Dr. Vito J. Carabetta's March 5, 2004, medical report as it was requested by the Judge.

The issues before the Board on this appeal are:

1. Are exhibits A, B, C, and D marked at Dr. Egea's deposition part of the evidentiary record? Likewise, is Dr. Carabetta's March 5, 2004, medical report to Judge Hursh part of the evidentiary record?
2. What injury and impairment did claimant sustain as a result of his June 27, 2003, accident?
3. Should claimant's award of permanent disability benefits be reduced due to preexisting functional impairment under K.S.A. 44-501(c)?
4. Is claimant entitled to receive payment or reimbursement of \$375 in charges incurred with Dr. Egea as unauthorized medical benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes claimant is entitled to receive permanent disability benefits under K.S.A. 44-510d for a 10 percent impairment to his right leg.

Respondent, which operated a restaurant, employed claimant as a dishwasher and prep cook. On June 27, 2003, claimant experienced a pop in his back while emptying a trash container. The next day claimant experienced pain or discomfort in his low back and

down into his right leg. The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

Following the June 27, 2003, incident, claimant received medical treatment from respondent's company physicians, which included physical therapy. That treatment significantly improved claimant's low back complaints and he became increasingly aware of right knee problems. A September 2003 MRI of claimant's right knee revealed a large posterior tear in the medial meniscus and a smaller tear in the posterior horn of the lateral meniscus.

After seeing Dr. Vito J. Carabetta in March 2004, which was pursuant to the Judge's order, claimant began treating with Dr. Thomas S. Samuelson. And in August 2004, Dr. Samuelson performed a partial medial and lateral meniscectomy on claimant's right knee.

Respondent terminated claimant following the accident. But claimant has since found similar employment.

This was not the first occasion that claimant had injured his low back. Claimant testified he injured his low back and in 1979 underwent surgery for a herniated disc in Mexico. The medical records from that operation were not introduced. And claimant was not certain but he thought the herniated disc was between the fourth and fifth lumbar vertebrae.¹

1. Are exhibits A, B, C, and D marked at Dr. Egea's deposition part of the evidentiary record? Likewise, is Dr. Carabetta's March 5, 2004, medical report to Judge Hursh part of the evidentiary record?

Claimant's attorney hired Dr. Fernando M. Egea to evaluate claimant. At the doctor's deposition respondent and its insurance carrier marked exhibits A, B, C, and D. Claimant argues those exhibits should not be considered as part of the evidentiary record as they were not offered into evidence during the deposition. In the alternative, claimant objects to exhibits A and B on the basis of relevancy.

Exhibit A is a copy of a complaint filed by the United States Department of Labor against Dr. Egea in a civil action in which the doctor allegedly breached his fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA). And exhibit B is a copy of the Judgment Against Defendant Fernando M. Egea that was filed in the civil

¹ R.H. Trans. at 25.

action. Exhibits C and D are copies from pages of the *AMA Guides*² that the doctor allegedly considered in rating claimant.³

Although respondent and its insurance carrier did not offer Exhibits A, B, C, and D at Dr. Egea's deposition, the exhibits were later offered in an October 4, 2005, letter to Judge Hursh. A copy of that letter was simultaneously mailed to claimant's counsel. Consequently, claimant's request to reject the exhibits on the basis that they were not offered should be denied. The litigation of a workers compensation claim is ongoing in nature. The failure to offer an exhibit during a hearing or deposition where it is initially marked and identified is not fatal as long as the exhibit is later offered with the adverse party or parties having an opportunity to object. This situation is very similar to a civil trial in which an exhibit is discussed by one witness but not offered into evidence until another witness later testifies.

The Board, however, concludes exhibits A and B are not relevant and, therefore, should not be considered as part of the evidentiary record. The exhibits do not establish the conviction of a crime involving dishonesty, false statement, or deceit. At the very most, exhibits A and B prove misconduct on a prior occasion but they are no more relevant to proving a lack of credibility or character as would any specific instance of an employer or its insurance carrier inappropriately withholding payment of workers compensation benefits. In short, exhibits A and B are excluded from the evidentiary record.

On the other hand, exhibits C and D are relevant as they were used by the doctor in formulating claimant's functional impairment rating. Consequently, the Board concludes exhibits C and D are part of the evidentiary record.

Likewise, Dr. Carabetta's March 5, 2004, medical report to Judge Hursh is also part of the evidentiary record. At the regular hearing, respondent and its insurance carrier requested the report be considered as part of the record but the Judge denied that request.⁴ The parties agree claimant was examined by the doctor and the medical report was prepared at the Judge's request for additional information.

Respondent and its insurance carrier argue the March 5, 2004, report should be part of the evidentiary record under the provisions of K.S.A. 44-516, which provides:

² American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

³ Egea Depo. at 47.

⁴ R.H. Trans. at 41-44.

In case of a dispute as to the injury, the director, in the director's discretion, or upon request of either party, may employ one or more neutral health care providers, not exceeding three in number, who shall be of good standing and ability. The health care providers shall make such examinations of the injured employee as the director may direct. The report of any such health care provider shall be considered by the administrative law judge in making the final determination.

The Board agrees with respondent and its insurance carrier that K.S.A. 44-516 is controlling. Accordingly, the March 5, 2004, medical report is admitted as part of the record for purposes of determining claimant's award.

2. What injury and impairment did claimant sustain as a result of his June 27, 2003, accident?

The parties agree that claimant sustained a right knee injury, which resulted in permanent functional impairment, as a result of the June 27, 2003, accident. The principal issue, however, is whether claimant also permanently injured his low back.

The record contains three expert medical opinions that address claimant's permanent functional impairment. But one opinion cannot be considered as it was formulated using the fifth edition of the *AMA Guides*.⁵ The other two opinions come from claimant's medical expert, Dr. Egea, and from the court-appointed neutral physician, Dr. Carabetta.

The parties stipulated in writing that certain medical records of Dr. Samuelson would be admitted into evidence. Those records included an October 6, 2004, letter in which the doctor stated claimant had sustained a six percent permanent partial impairment as measured by the *AMA Guides* (5th ed.). As the doctor did not treat claimant's back, it is presumed the rating pertains to the right leg.

In short, Dr. Egea examined claimant in November 2004 and concluded that under the *AMA Guides* (4th ed.) claimant sustained a four percent whole person functional impairment due to his right knee partial lateral and medial meniscectomy and a 10 percent whole person functional impairment due to low back traumatic chronic myofascitis and radiculopathy. The doctor combined those ratings for a 14 percent whole person functional impairment.

On the other hand, Dr. Carabetta saw claimant in March 2004 and March 2005 and concluded that under the *AMA Guides* (4th ed.) claimant had a 10 percent impairment to

⁵ See K.S.A. 44-510e.

his right leg but no impairment to his low back from the June 2003 accident. The doctor's March 31, 2005, report to Judge Hursh addresses claimant's low back rating, as follows:

He [claimant] has some complaints of lower thoracic and lumbar area pain. The physical examination at this time does not demonstrate any palpable spasm, nor any focal tenderness, only some mild generalized tenderness in the lower lumbar area. In assessing his level of impairment in the lumbar region, the preferred DRE [(Diagnosis-Related Estimates)] method is implemented. As per Table 74 on page 111 of the *Guides*, as well as possibly referencing Table 72 on page 110, his presentation would be consistent with a Category I situation. Therefore, no specific impairment would seem to apply in terms of any mechanical back pain. However, it is possible that at this late time he may occasionally have an absence of palpable muscle spasm that would serve as an objective finding. Therefore, a Category II classification could be considered, and this would suggest a possible 5 percent whole person impairment that could apply. In his situation, however, he does have a history of a prior lumbar disc surgery in 1979, and his premorbid level of impairment would have actually been a Category III situation by definition. Therefore, no net impairment in terms of any back injury would apply with regard to the injury in question that occurred with this employer on June 27, 2003.

The Board affirms the Judge's finding that claimant sustained a 10 percent functional impairment to the right leg. Likewise, the Board affirms the Judge's finding that claimant failed to prove that he sustained any additional impairment to his low back as a result of the June 2003 accident. The Board is persuaded by the opinions of Dr. Carabetta, who was brought into this claim as a neutral physician.

In light of the above findings, under K.S.A. 44-510d claimant is entitled to receive permanent disability benefits for the right leg injury. Moreover, claimant's award should not be reduced for any preexisting functional impairment in his low back.

3. Is claimant entitled to receive payment or reimbursement of \$375 in charges incurred with Dr. Egea as unauthorized medical benefits?

Judge Hursh denied claimant's request for payment or reimbursement of the \$375 that Dr. Egea charged to examine and evaluate claimant. The Judge reasoned that claimant saw Dr. Egea for purposes of obtaining a second opinion regarding his impairment. The Judge cited K.S.A. 44-510h, which provides that unauthorized medical benefits should not be used to obtain a functional impairment rating.

Dr. Egea's testimony is uncontradicted that claimant was concerned whether he might need another back surgery.⁶ After examining claimant, the doctor prepared a medical report, which is dated November 8, 2004, indicating claimant had reached maximum medical improvement pertaining to both his low back and right knee.

Dr. Egea did not provide an impairment rating in his November 8, 2004, report. The doctor, however, did provide a permanent functional impairment rating after claimant's attorney made a later request. For that subsequent rating report, the doctor charged a separate fee of \$25.

Injured workers are entitled to use up to \$500 to seek unauthorized medical services. Those services include second opinions regarding treatment recommendations as well as appropriate work restrictions and limitations.

The Board has previously held that a claimant may use the unauthorized medical allowance to obtain an examination and thereafter obtain a functional impairment rating from that same examining physician so long as claimant pays for such a rating separately. The claimant can then choose whether or not to enter the functional impairment rating into the record and this would not violate the provisions of K.S.A. 1996 Supp. 44-510(c)(2). See *Castro v. IBP, Inc.*, [29] Kan. App. 2d. [475], 30 P.3d 1033 (2001).⁷

The Board finds that by the barest of margins claimant established that he sought a second opinion from Dr. Egea to determine if there might be additional treatment for his back. Consequently, claimant is entitled to receive either payment or reimbursement of the \$375 charged by Dr. Egea to examine claimant and make his first report.

AWARD

WHEREFORE, the Board affirms in part and modifies in part the November 14, 2005, Award entered by Judge Hursh. The Board affirms claimant's award of a 10 percent permanent partial disability to the right leg as provided by K.S.A. 44-510d. But the Board also grants claimant \$375 in unauthorized medical expense.

Claimant may request additional medical treatment upon proper application.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

⁶ Egea Depo. at 14.

⁷ *Wright v. Lawrence Paper Company*, No. 241,804, 2001 WL 1399451 (Kan. WCAB Oct. 31, 2001).

IT IS SO ORDERED.

Dated this ____ day of March, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Gary R. Terrill, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director